STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLC	**)**	
-vs-	**)**	
Illinois Bell Telephone Company d/b/a	**)**	
AT&T Illinois	**)**	**Docket No. 11-0696**
	)	
Formal Complaint pursuant to Sections 13-	**)**	
515 and 10-108 of the Illinois Public	**)**	
Utilities Act	**)**	
	)	

BRIEF ON EXCEPTIONS OF CBEYOND COMMUNICATIONS, LLC

Filed: February 4, 2012

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COMES NOW, Cbeyond Communications, LLC ("Cbeyond"), by and through its attorneys, to hereby file this Brief On Exceptions to the Proposed Order, filed January 22, 2013. For the reasons set forth herein, Cbeyond respectfully asks the Illinois Commerce Commission ("Commission" or "ICC") to modify the Proposed Order with the substitute language provided in Exhibit A and detailed herein.

I. INTRODUCTION AND SUMMARY OF POSITION

At the outset it is important to understand two things: (1) this case alleges that Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T") is intentionally over-billing one of its customers in contravention of state law, an ICC Order and the contract between the parties; and (2) the Proposed Order summarily dismisses the entirety of that customer's complaint before making any factual determination that AT&T is (or is not) double-recovering its costs in violation of the parties contract, state law or the ICC Order. As setforth below, the proposed ruling is manifestly incorrect as a matter of law and fact. It cannot withstand judicial scrutiny.

In the interest of justice and the efficient management of this Commission's resources, the Proposed Order should be amended.

The law is clear: a cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 504, 565 N.E.2d 654 (1990). The facts alleged here are that a carrier is overbilling, in contravention of an ICC order, state law and a contract between the parties.[1] How can that not present a situation where "a set of facts" **could** exist that would entitle the complaining carrier to prevail? This is not a case where there is a statute of limitations, lack of standing, lack of jurisdiction or some other total bar to the case proceeding. This case is being summarily (and illegally) rejected before there is even an Answer to the complaint by AT&T, or any discovery or effort to get at the facts. Such treatment of an allegation of overbilling in contravention of an ICC order cannot and should not stand. For the reasons provided herein, the Proposed Order should be amended to:

- Reverse the Proposed Order's dismissing Count IV of the Second Amended Complaint in the second half of Section III(b)(3) because am ambiguous contract at issue cannot be dismissed on a motion to dismiss and because AT&T failed to attach an affidavit verifying facts outside the face of Cbeyond's Second Amended Complaint;

- Add a paragraph to the first half of Section III(b)(3) of the Proposed Order explaining that a contract between two parties does not automatically give one of the parties free reign to break the law. AT&T suggests that the contract with Cbeyond is a bar to any claim it violated Illinois law. The ALJ properly rejected that assertion, and Cbeyond asks that the Order reflect that;

- Revise Section III(c)(1) of the Proposed Order be edited to deny AT&T's 735 ILCS 5/2-615 motion for four reasons: (1) AT&T's 735 ILCS 5/2-615 Motion

[1] Cbeyond's Second Amended Complaint ("2nd Am. Complaint"), at ¶¶ 12-28, 37, 39-42 (references herein to the 2nd Am. Complaint are to paragraphs within it).

To Dismiss is facially inadequate; (2) Cbeyond did plead sufficient facts for at least Counts I, II and III; (3) the ALJ relied on a factually inaccurate representation to dismiss Counts I, II and III; and (4) it is almost certainly an abuse of discretion to dismiss Counts I, II and III with prejudice given the inadequacy of specificity in the ALJ's prior order or guidance;

- With respect to Section 13-801, Cbeyond suggests rejecting Section III(c)(2) of the Proposed Order because it is an incorrect interpretation of 220 ILCS 5/13-801. The interpretation suggested in the Proposed Order is contrary to the statutory language, legislative history and the past treatment of this provision by the Illinois Commerce Commission;

- Cbeyond proposes that the introductory paragraphs of the Proposed order be edited to reflect the ruling proposed by Cbeyond in this Brief on Exceptions;

- With respect to Docket 10-0188, Cbeyond proposes that the opening sentence of Section II(a) of the Proposed Order be edited to make it clear that the entire dispute in this Docket was not litigated in Docket 10-0188. AT&T, the ALJ and Cbeyond all agree only "Category 1" charges were at issue in Docket 10-0188;

- Cbeyond proposes that the grant of the portion of AT&T's Motion To Dismiss specific to "Category 1" charges be expanded to include all Category 1 claims in all Counts in Cbeyond's Second Amended Complaint. If it is improper to litigate Category 1 charges for Count I, then it is equally improper for Counts II, III and IV; and

- Cbeyond suggests Section III of the Proposed Order at Page 13 (which should be Section IV) be edited in order to match the changes Cbeyond suggests herein and to correct the numbering of that Section.

II. BACKGROUND

This case, though thick with telecom gobbledygook, is fairly simple. AT&T is charging more than the rate established by the Commission for certain telecommunications products (called transport).[2] When Cbeyond orders those products, it wants to pay the ICC-established price for them – the rate the Commission ordered to apply for that purpose.[3] Cbeyond does pay

[2] *Id.*

[3] *Id.*

the undisputed portion of AT&T's bills for transport, but is disputing an extra charge tacked-onto the transport bill (called a clear channel charge).[4] Cbeyond disputes the clear channel charge because the ICC already included that charge in the price for transport (which Cbeyond is also paying).[5] Despite a great deal of negotiations, AT&T refuses to fix its billing.[6]

The following are the facts of this case, which are deemed true for the purposes of resolving AT&T's Motion to Dismiss[7]:

The Original Contract

AT&T and Cbeyond have an Interconnection Agreement or "ICA" that was approved in ICC Docket 04-0420.[8] That contract stated that all services AT&T provided – and Unbundled Network Elements ("UNEs") in particular – would be provided at TELRIC prices.[9] The product at issue here – transport – is a UNE.[10] TELRIC is a federal pricing standard that is easiest to think of as "cost-based plus a reasonable profit" method for pricing.[11] The only thing about TELRIC that is important in this case is that it is a well-established violation of TELRIC pricing

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[4] *Id.* at Introduction and ¶ 33.

[5] *Id*. at ¶¶ 26-28, 33.

[6] *Id.* at ¶ 4.

[7] *Heastie v. Roberts*, 226 Ill. 2d 515, 530, 877 N.E.2d 1064 (2007); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202 (1st Dist.1988).

[8] 2nd Am. Complaint, at ¶ 1.

[9] *Id*. at ¶ 37.

[10] *Id*.

[11] *Illinois Bell Telephone Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008).

to double-bill for providing a product (what AT&T is doing here).[12] Clear channel allows for more efficient use of the whole telephone circuit, especially for carriers like Cbeyond who use the latest digital technologies. In the (more complex) words of AT&T:

> Clear Channel Capability (CCC) is a feature that provides the customer an increased useable bandwidth of 1.536 Mbps from 1.344 Mbps of an unconstrained data stream across the network.[13]
>
> ICC Docket 02-0864

The Commission established TELRIC rates for both transport and line coding (clear channel) in ICC Docket 02-0864.[14] The rate for line coding (when provided alone) was identified

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[12] In *In re Access One, Inc.*, Docket No. 05-0442, 2005 WL 3359097, *138 (ICC Nov. 2, 2005), the Commission found that "TELRIC rates, including the relevant fill factors, already recover any costs associated with placing and splicing cable to provision a CLEC with an unbundled loop. Accordingly, assessing additional charges for placing and splicing cable in excess of Ameritech's current TELRIC rates would constitute double recovery and is prohibited." *Citing McLeod USA Telecommunications Services, Inc. v. Illinois Bell Telephone Company dba Ameritech Illinois*, Docket No. 99-0525, 1999 WL 1334695, *172 (ICC Dec. 20, 1999); s*ee also,* Illinois Commerce Commission *On Its Own Motion v. Illinois Bell Telephone Company*, Docket No. 99-0593, 2000 WL 34446678, pgs. 18, 43 (ICC Aug. 15, 2000) ("Among the allegations made during this investigation is that Ameritech is already recovering through the recurring rates that it charges for UNEs the costs that it seeks to recover through special construction charges. Such double recovery is not permissible."; "The Commission concurs with Staff and finds that Ameritech's costs associated with defective loop recovery are already recovered in the TELRIC rate. … Since Ameritech may not provide unusable UNEs to CLECs, its costs for repairing defective loops has been included in the TELRIC rate. Accordingly, Ameritech may not collect additional revenue for defective loop recovery since such would constitute double recovery of costs already reflected in TELRIC studies."; "Ameritech claims that the ICC's holding that it may not recover such costs through special construction charges runs headlong into the FCC's mandate allowing recovery. Properly framed, however, the ICC's holding was not that Ameritech cannot recover its "unbundling" costs, but only that it already does recover the costs through its standard monthly TELRIC-based loop prices, and therefore, its assessment of special construction charges constitutes a double recovery…Given that TELRIC rates recover Ameritech's investment in a facility over the life of the facility, Ameritech's assessment of special construction charges for such a COT/RT system would constitute double recovery."); *and, also see Illinois Bell Tel. Co. v. Wright*, 245 F. Supp. 2d 900 (N.D. Ill. 2003)

[13] 2nd Am. Complaint, at ¶ 26.

as $70.32.[15] More importantly, in Docket 02-0864 the Commission established the non-recurring rate structure for transport. (Docket 02-0864 established non-recurring costs not addressed in the Commission's original TELRIC docket).

Transport originally did not include the cost of line coding for clear channel – it was charged separately. But in Docket 02-0864, the Commission included the $70.32 cost of line coding in the transport rate.[16] So, the new transport rate was $70.32 more expensive because of the inclusion of line coding.[17]

As a consequence, if clear channel line coding was ordered at the same time as new transport, there would not be an extra $70.32 charge for it.[18] If Cbeyond ordered a change in the line coding for an existing transport circuit, then that change would cost $70.32. Every witness who filed testimony on the subject of the transport rate in Docket 02-0864, including CLECs, Illinois Bell (now AT&T) and Staff (Dr. Zolnierek) (all of whose testimony is quoted in Cbeyond's Second Amended Complaint) were in agreement that if transport and clear channel line coding were ordered at the same time, only the transport rate should properly be charged.[19]

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[14] *Id*. at ¶¶15-28.

[15] *Id*. at Exhibit 5 (Attachment A to the 02-0864 Amendment).

[16] *Id*. at ¶¶ 15-28.

[17] *Id*.

[18] *Id*.

[19] *Id*.

After Docket 02-0864 was finished, AT&T filed the final version of its rate case "per the Order in ICC Docket No. 02-0864 issued on June 9, 2004."[20] It is very important to note three things about this particular filing by AT&T: (1) it was filed by Illinois Bell (now AT&T); (2) by its own terms it was filed "per the Order" in Docket 02-0864; and (3) it was filed AFTER the rate case was final.[21] Therefore, it is an admission of a key fact in this case by the defendant in this case. In its filing, AT&T set-out the rate structure for clear channel (abbreviated "CCC"): "If CCC is provisioned at the time that a DS1 [transport] service is provisioned coding can be done within the normal provisioning activities that occur in the DS1 [transport], therefore there is no additional CCC non-recurring charge. If however CCC is provisioned on an existing DS1 [transport] service, a non-recurring charge does apply . . ."[22] So, although the Order in Docket 02-0864 was silent on the application of the CCC rate and the transport rate, the defendant in this case (AT&T) filed a cost study "per" that Order expressly stating how those two rates should be applied.[23]

In sum, it was the intention of the ICC, the understanding of every party in Docket 02-0864, and the understanding of AT&T when it filed the final rate case in compliance with the ICC's Order in Docket 02-0864 after the case was over that, if a carrier ordered new transport with clear channel line coding, the cost of clear channel line coding was already included in the

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[20] *Id*. at ¶ 26.

[21] *Id*.

[22] *Id*.

[23] *Id*.

transport rate. Had AT&T billed Cbeyond that way (the way the ICC intended the rates to apply), there would be no dispute in this case. But that was not to be.

The ICC Docket 02-0864 Amendment To The ICA

In early 2005, Cbeyond and AT&T adopted all the rates and rate structures from Docket 02-0864 (and specifically the rates and rate structures from AT&T's final rate case filing) into the parties' ICA (the "Docket 02-0864 Amendment").[24] That amendment specifically provided that, if the amendment created any inconsistency between its terms and the ICA as it existed before the amendment, then the Docket 02-0864 Amendment would control. The Docket 02-0864 Amendment also repeatedly represents that it was intended to incorporate the pricing changes from Docket 02-0864 – including the rate structures from that case – into the ICA.[25]

The TRO/ TRRO Amendment To The ICA

Later in 2005, the Federal Communications Commission issued new rules, including new rules about UNE transport. As a result of these new rules, in December 2005, the parties amended the ICA again and, among the many changes related to UNE transport, the parties' amendment also reiterated that transport had to be provided at TELRIC rates (the "TRO/TRRO Amendment").[26] This amendment further stated that if the amendment created any inconsistency

[24] *Id*. at ¶¶ 10 and 37.

[25] *Id.* at ¶ 37.

[26] *Id*. at Exhibit 2.

between its terms and the ICA before the TRO/TRRO Amendment, then the TRO/TRRO Amendment would control.[27]

This Docket's Procedural History

Cbeyond first complained that AT&T was incorrectly billing the CCC rate in Docket No. 10-0188.[28] Docket 10-0188 was primarily about AT&T charging for the provisioning of a loop in the context of a rearrangement of an EEL (rearranging an EEL involves ordering new transport to replace the existing transport in a loop-transport combination).[29] Since the loop never changes, Cbeyond argued that it should not have to pay for a new loop when it ordered new transport to be combined with the old loop. Cbeyond also included an allegation that AT&T should not be billing for CCC for the rearranged EEL. In ruling against Cbeyond, the Commission specifically ruled that Cbeyond needed to pay for the re-used loop as if it were new, but did not specifically address the issue of whether the CCC rate was or was not included in the transport rate element, or whether the parties' ICA does or does not allow AT&T to charge CCC rate in addition to transport issue.[30] After a brief dispute with AT&T over the meaning of the Order from Docket 10-0188, Cbeyond paid all the loop charges, but escrowed the CCC charges at issue in Docket No. 10-0188.

This Docket followed. Cbeyond continues to challenge both the CCC charges which it raised and went unresolved in Docket No. 10-0188 (what are called "Category 1 charges"

[27] *Id*.

[28] *Id.* at ¶ 29.

[29] *Id*.

[30] *Id*. at 30.

because they were related to charges associated with EELs), but also challenges in this Docket all of the CCC charges it can challenge (going back 2 years) under the ICA (what are called "Category 2" charges).[31] AT&T moved to dismiss Cbeyond's first complaint in this Docket based in part on an assertion that AT&T and Cbeyond had not properly finished negotiations over the Category 2 charges. Under the dispute resolution provisions of the ICA, Cbeyond could not bring a complaint about those charges until formal negotiations were completed.[32] In the interest of resolving the case, Cbeyond asked the ALJ to stay its case to allow the parties to continue negotiations.

Those negotiations failed to resolve the dispute, and Cbeyond was granted leave to file an amended complaint. Cbeyond did so and AT&T again moved to dismiss Cbeyond's Amended Complaint. On August 31, 2012, the ALJ granted AT&T's motion to dismiss Counts I, II and III, but found that Cbeyond had pled sufficient facts to sustain its Count IV (a breach of contract claim).[33] The ALJ gave Cbeyond leave to amend Counts I, II and III. Cbeyond filed its Second Amended Complaint, adding additional details relating to AT&T's admissions in Docket 02-0864 and realleging all four original counts. AT&T then moved to dismiss for a third time. The Proposed Order is the suggested ruling on that motion.

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[31] *Id*. at ¶ 33.

[32] *Id*. at Exhibit 3.

[33] ALJ Ruling, ICC Docket No. 11-0696, filed August 31, 2012, pg. 6 ("Cbeyond has alleged sufficient facts to establish a prima facie case for breach of contract").

III. EXCEPTIONS AND PROPOSED SUBSTITUTE LANGUAGE

For the reasons provided below, the dismissal of Cbeyond's Counts I, II and IV as to Category 2 charges was improper as a matter of law and should be corrected. The dismissal of Count III should have been without prejudice and with leave to amend.

1. Proposed Changes To The Second Half Of Section III.(b)(3), Entitled "That The Parties' Interconnection Agreement (their 'ICA') Controls The Billing Dispute In Question, Not State Or Federal Law."

The second half of Section III.(b)(3) of the Proposed Order addresses Cbeyond's Count IV, breach of contract claims. This section should be edited to reverse the Proposed Order for two reasons: (1) the Proposed Order is incorrect as a matter of law; and (2) AT&T's Motion To Dismiss was procedurally improper.

A. The Proposed Order Is Incorrect As A Matter Of Law

The Proposed Order concludes that the contract – *i.e.*, the parties' ICA – is ambiguous, but then relies on that ambiguity to assert that "it is well-settled that when a contractual ambiguity exists, the more specific provision governs over any general provisions."[34] That ambiguity is the Proposed Order's basis to dismiss Count IV (breach of contract).[35] However, once the ALJ determined that there was an ambiguity in the contract, that should have been the end of her inquiry.

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[34] Proposed Order, at pg. 10.

[35] *Id*.

It is well-settled law that a breach of contract claim cannot be dismissed at this stage of the proceeding if there is an ambiguity in the contract at issue. *Hubbard Street Lofts v. Inland Bank*, 2011 Ill. App (1st) 102640, 102651, 963 N.E.2d 262 (2011), appeal denied, 968 N.E.2d 81 (Ill. 2012) ("It is well-established that if a contract is ambiguous, it presents a question of fact and cannot be decided on a motion to dismiss."). Here, the Proposed Order recognizes an ambiguity in the contract at issue by acknowledging that Cbeyond and AT&T dispute which provision of the ICA apply to the charges.[36] Therefore, on a pre-Answer motion to dismiss, the ALJ's inquiry should have ended. As a matter of law, the Proposed Order incorrectly dismisses Count IV.

B. AT&T's Motion Is Procedurally Improper

The procedural rule governing AT&T's Motion To Dismiss states that if the grounds for a Section 2-619 motion "do not appear on the face of the pleading attacked, such motion shall be supported by affidavit." 735 ILCS 5/2-619(a). AT&T's Motion expressly states that "Cbeyond's Complaint does *not* address the only ICA provisions that are relevant . . .,"[37] clearly raising facts that do not appear on the face of Cbeyond's Second Amended Complaint. Yet AT&T did not attach the required affidavit.

Because AT&T's Section 2-619 Motion To Dismiss relies on ICA provisions that were not addressed in Cbeyond's Second Amended Complaint (the pleading being attacked), and does not attach the required affidavit, AT&T's Motion To Dismiss is procedurally improper. *See Yale*

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[36] *Id*.

[37] AT&T Motion To Dismiss, pg. 23 (emphasis in original).

Dev. Co. v. Oak Park Trust & Savings Bank, 26 Ill.App.3d 1015, 325 N.E.2d 418 (2nd Dist. 1975) (denying a motion to dismiss based on the absence of an affidavit).

C. There Are Also Three Clarifications Needed

If the Commission does not follow the law set-out above, there are three important corrections needed in the ALJ's factual basis for the Proposed Order's language in the second half of Section III.(b)(3). First, the ALJ represents that "Cbeyond does not dispute the validity of this contract or the applicability of this particular provision."[38] While it is true that Cbeyond does not dispute the validity of the ICA (the contract at issue), Cbeyond very much does dispute the applicability of the particular provision in the ICA that is at issue - indeed that is the whole of the dispute between the parties.[39]

Next, the Proposed Order states, "While Cbeyond asserts that the more general provisions were negotiated after the specific pricing provisions that AT&T asserts, it cites no law establishing that this specific pricing provision must not be applied here."[40] This statement is factually inaccurate and legally erroneous. Cbeyond did point to both the Docket 02-0864 Amendment and TRO/TRRO Amendment provisions stating that any inconsistency between those amendments and the existing ICA must be resolved by the amendment's terms.[41] Those two amendments adopted pricing structures and standards inconsistent with the reading of the "particular provision" the Proposed Order points to from the earlier version of the contract. The

[38] Proposed Order, at pg. 10.

[39] 2nd Am. Complaint at ¶ 37, and *passim*.

[40] Proposed Order, at pg. 10.

[41] Cbeyond's Response to AT&T's Motion To Dismiss Second Amended Complaint, at pg. 20

inconsistent terms (in favor of Cbeyond's reading of the contract) should therefore prevail. Cbeyond also specifically cited the governing standard: "All well-pleaded facts in the complaint must be deemed true, and any reasonable inferences drawn from the allegations of fact must be liberally construed in favor of the non-moving party. *South Chicago Savings Bank v. Braxton*, 178 Ill. App. 3d 545, 549; 533 N.E.2d 480, 482 (1st Dist. 1988)."[42]

Finally, the Proposed Order makes an odd statement that should be corrected: "Further, there is no evidence indicating that Cbeyond is not able to re-negotiate the terms of that contract. This is further indicia that AT&T has not breached that contract."[43] The fact that both parties have the ability to request renegotiation (pursuant to federal law) of the contract has absolutely no bearing on whether AT&T has breached it. Cbeyond and AT&T have been negotiating about this dispute for years, and while those negotiations are confidential (despite the fact that AT&T continues to attach emails from those discussions to its motions), the Commission and the ALJ should rest assured that if there was any possibility of correcting AT&T's billings with an amendment to the ICA, it would have already happened.

More importantly, such a renegotiation of the contract would entail years of arbitration (*see, e.g.*, the Level 3 arbitration which took 2 years and 9 months) and negotiation, as well as hundreds of thousands of dollars in expense – AND – a renegotiation would have no impact on all the past incorrect bills from AT&T. AT&T routinely requires total renegotiation of the whole contract based on its "standard offering" in lieu of any renegotiation of a single term. But even if an arbitration over a single term were available, the parties' negotiations to date demonstrate that

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[42] *Id*.

[43] Proposed Order, pg. 10.

they would be at an impasse and an arbitration before the Commission would be required anyway (again, without the possibility of resolving past billing issues).

While the above three statements in the Proposed Order are not necessary to the resolution of these exceptions, they are important to correct in the event the Commission considers them. Cbeyond suggests the following edits to the Proposed Order (at pg. 10):[44]

> ~~However~~ Next, AT&T has asserted that the specific pricing in Section 9.2.7.7.5 of the parties' ICA sets forth the price for Clear Channel Capability, which, it states was followed with respect to the charges imposed upon Cbeyond. AT&T Reply at 14-15. This argument fails both as a procedural matter as well as a legal matter.
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> First, without the affidavit required by 735 ILCS 5/2-619(a), the evidence put forth by AT&T is procedurally improper. AT&T expressly states that "Cbeyond's Complaint does not address the only ICA provisions that are relevant . . ." AT&T Motion at page 23. As stated in the "Applicable Legal Standards" herein, if the grounds for a Section 2-619 motion "do not appear on the face of the pleading attacked, such motion shall be supported by affidavit." 735 ILCS 5/2-619(a). No such affidavit is attached. Because AT&T's 619 Motion to Dismiss relies on ICA provisions not in the Complaint (the pleading being attacked), without the required affidavit, it is procedurally improper.[45]
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> Secondly, even if AT&T raised this theory in a procedurally proper way, it is legally improper at this stage in the proceeding. At this stage, the Complaint's factual allegations are deemed true.[46] As such, there exists a conflict between one set of contractual provisions which state that the transport service must be provided at TELRIC[47] (which doesn't allow for double-recovery) and the

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[44] Where edited language is provided, proposed additions are show as underlined (*e.g.,* the Motion is denied in part) and proposed deletions are show as stricken through (*e.g.,* the Motion is granted ~~in part~~)

[45] Despite the normal mandatory treatment of the term "shall" in a procedural rule, Illinois courts have ruled that failure to file the required affidavit is not necessarily fatal to a defendant's motion. *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296, 678 N.E.2d 1082 (1997).

[46] *Heastie v. Roberts*, 226 Ill. 2d 515, 530, 877 N.E.2d 1064 (2007); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202 (1st Dist. 1988).

47 Second Am. Complaint, at ¶ 37.

provision AT&T points to, which states the line coding service is available for an additional fee (but would create a double-recovery in violation of TELRIC).[48] That conflict creates an ambiguity which cannot be resolved in a Motion to Dismiss. *Hubbard Street Lofts v. Inland Bank*, 2011 IL App (1st) 102640, 102651, 963 N.E.2d 262)("It is well-established that if a contract is ambiguous, it presents a question of fact and cannot be decided on a motion to dismiss.").[49] So whether AT&T's theory was presented in a procedurally acceptable format or not, it is premature in the context of a Motion to Dismiss. Accordingly, AT&T's Motion to Dismiss Counts I through IV on the basis of the ICA is denied as it applies to Category 2 charges.

~~Cbeyond does not dispute the validity of this contract or the applicability of this particular provision. Instead, Cbeyond asserts that general provisions in the parties' ICA determine the price of Category 1 charges. *See*, Cbeyond Response at 20-21. However, it is well-settled that when a contractual ambiguity exists, the more specific provision governs over any general provisions. *See*, *e.g.*, *Nationwide Mutual Fire Ins. Co. v. T and N Master Builder and Renovators*, 2011 IL App (2d) 101143, 101153, 959 N.E. 2d 201; *Hubbard Street Lofts v. Inland Bank*, 2011 IL App (1st) 102640, 102651, 963 N.E.2d 262. While Cbeyond asserts that the more general provisions were negotiated after the specific pricing provisions that AT&T asserts, it cites no law establishing that this specific pricing provision must not be applied here. *See*, *e.g.*, Cbeyond Response at 20-21.~~

~~Further, there is no evidence indicating that Cbeyond is not able to re-negotiate the terms of that contract. This is further indicia that AT&T has not breached that contract. Therefore, the Commission grants dismissal Counts II, III and IV based upon this argument.~~

2. Proposed Changes To The Last Paragraph of Section III.(b)(2), Entitled "That Disputing the Legality of Category 1 Charges Exceeds the Authority Granted to Cbeyond in the August 31, 2012 ALJ Ruling."

The Proposed Order incorrectly concludes that Cbeyond had waived its right to raise claims in Counts I, II and III in Section III.(b)(2). The Proposed Order must be modified to

[48] 2nd Amended Complaint, at ¶¶ 37 and 40; AT&T Motion To Dismiss, at pg. 23.

[49] *See also, Quake Constr. v. American Airlines*, 141 Ill. 2d 281, 565 N.E.2d 990 (1990).

delete the last paragraph of this Section for two reasons: (1) it is unnecessary; and (2) it is incorrect as a matter of law.

The first paragraph[50] of this Section makes it clear that AT&T's argument is "procedurally incorrect," and the second paragraph states that the prior ruling in Docket 10-0188 regarding Category 1 charges makes AT&T's argument moot. As such, the third paragraph of this Section is unnecessary to the resolution of AT&T's argument.

More importantly, the "law of the case" assertion[51] made in the last paragraph is legally incorrect in the context presented here. It is well-settled in Illinois – in what is called the "*Foxcroft* Rule" – that objections to the dismissal of a count in an earlier complaint are preserved when that same count is realleged by the plaintiff in an amended complaint. *Foxcroft Townhome Owners Assoc. v. Hoffman Rosner Corp*., 449 N.E.2d 125, 96 Ill. 2d 150 (1983); *Childs v. Pinnacle Health Care*, 926 N.E.2d 807, 399 Ill. App. 3d 167 (2nd Dist. 2010); *Doe v. Roe*, 681 N.E.2d 640, 643, 289 Ill. App. 3d 116, 119 (1st Dist. 1997) ("An amended complaint must reallege, incorporate by reference, or at least refer to the claims and supporting facts set forth in a prior complaint in order to preserve for review the question of the propriety of the court's rulings in relation to the prior complaint.").

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[50] Proposed Order, at pg. 9 ("AT&T also argues Cbeyond exceeded the authority granted to it … This argument is procedurally incorrect.").

[51] Proposed Order, at pg. 9 ("Cbeyond failed to assert its right to challenge any mistake in that Ruling (e.g. Motion for Reconsideration). Left unchallenged as it was, Cbeyond cannot now claim that the August 31, 2012 ALJ Ruling was erroneous.")

Because Cbeyond realleged all of the counts and facts from its First Amended Complaint, Cbeyond did not waive any objection to errors contained in the ALJ's August 31 ruling.[52] The last paragraph of Section III.(b)(3) is an incorrect statement of law and unnecessary, and must be deleted.

The edits Cbeyond suggests to Section III.(b)(3) of the Proposed Order (pg. 9) are:

> AT&T also argues that, when asserting Category 1 claims, Cbeyond exceeded the authority granted to it when the ALJ Ruling of August 31, 2012, allowed Cbeyond leave to file another Amended Complaint. This argument is procedurally incorrect. As is always the case in this type of situation, Cbeyond was free to make any claim it desired, as long as it could establish a legal claim. There was and indeed there could be no limitation on what claims that Cbeyond could file.
>
> However, even a cursory reading of the arguments presented in AT&T's previously-filed Motion to Dismiss Cbeyond's First Amended Complaint, as well as the discussion in the ALJ Ruling of August 31, 2012, made it clear that this Commission does not have the legal authority to re-litigate what was already decided in Docket 10-0188.
>
> ~~Cbeyond additionally contends that the ALJ Ruling of August 31, 2012 incorrectly concluded that Cbeyond only asserted Category 2 charges. Cbeyond Response at 8. This argument ignores the fact that Cbeyond failed to assert its right to challenge any mistake in that Ruling (e.g., by filing a Motion for Reconsideration). Left unchallenged as it was, Cbeyond cannot now claim that the August 31, 2012 ALJ Ruling was erroneous. This Commission encourages both parties to adhere to this very basic tenet of Civil Procedure.~~

3. Proposed Changes To The First Half Of Section III.(b)(3), Entitled "That The Parties' Interconnection Agreement (their "ICA") Controls The Billing Dispute In Question, Not State Or Federal Law."

The Proposed Order incorrectly concludes that the ICA can be construed in a manner that conflicts with state and federal law on TELRIC principles. Section III.(b)(3) of the Proposed

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[52] *Compare* 1st Am. Complaint *to* 2nd Am. Complaint.

Order must be modified to explain that a contract between two parties does not automatically give one of the parties free reign to break the law. AT&T's Motion To Dismiss argues that the existence of the contract between Cbeyond and AT&T acts as a total bar to any claims under the Illinois Public Utilities Act ("PUA") – specifically, Cbeyond's Counts I, II and III (alleging violations of the PUA).[53] That argument is facially absurd as well as procedurally and statutorily incorrect. Notably, the Proposed Order agreed that it is improper.

A. AT&T's Defense Is Absurd

AT&T argues that the mere existence of the contract means – and the implication of this is important for the Commission to recognize – that AT&T cannot violate the PUA provisions of Illinois law or violate federal law UNDER ANY CIRCUMSTANCES, even if AT&T breaches the contract. In AT&T's own words: "Thus, once the terms of the ICA are set, that document is the exclusive statement of the parties' rights and obligations – and both federal *and* state law operating on their own force are irrelevant."[54] The kind of motion AT&T asserted in this Docket ONLY applies to absolute defenses – defenses that warrant dismissal of a claim under ANY set of facts. 735 ILCS 5/2-619. AT&T's representation is manifestly absurd.

AT&T attempts to couch its language (*e.g.*, "the Commission does not have authority . . . to modify . . .")[55] in an effort to obfuscate the implications of its Motion To Dismiss arguments. However, the Commission should not be fooled: AT&T is attempting to vastly expand the

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[53] AT&T Motion to Dismiss, at pg. 20

[54] *Id*. at pg. 20 (emphasis in original).

[55] *Id*.

defensive power of a contract well beyond its legal limits. This is doubly true in a case where the allegation is that AT&T breached the contract.

B. AT&T's Argument Is Procedurally Incorrect

AT&T's Motion – any motion for that matter – made under 735 ILCS 5/2-619 must assert specific "defects or defenses" which would entitle the defendant to dismissal. The Code of Civil Procedure sets out nine grounds for such a motion:

> Sec. 2-619. Involuntary dismissal based upon certain defects or defenses.
>
> (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> (1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
>
> . . .
>
> (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

Since AT&T did not identify which of the grounds it was relying on for this portion of its Motion to Dismiss, the ALJ was left to guess: "AT&T's Motion seems to imply that the presence of the parties' ICA is an 'affirmative matter' under Section 2-619(a)(9), which defeats Cbeyond's claim that AT&T has violated the PUA."[56] So, AT&T alleges that once the parties have a contract, its existence constitutes an affirmative bar to any claim under federal or state law, arguing that Counts I through III are affirmatively barred.

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[56] Proposed Order, at pg. 9.

The law is clear on this point: there can be no affirmative defense based on a contract which is breached by the party seeking to use the contract as a defense. Any conclusion to the contrary is procedurally incorrect. It is a well-recognized principle of contract law that a party who has breached the terms of its contract may not rely on the same contract to avoid its obligations. *M/A Com, Inc. v. Perricone*, 187 Ill. App. 3d 358, 543 N.E.2d 228 (1989), *citing Kinnan v. Charles B. Hurst Co.*, 317 Ill. 251, 148 N.E. 12 (1925). Said another way, once AT&T breaches the contact, it loses any protections the contract might afford. The ALJ agrees with this assertion: "The fact that there is a binding contract between the parties in itself should not be deemed an affirmative matter defeating Cbeyond's claim."[57]

Accordingly, Cbeyond asks that the first half of Section III.(b)(3) (at pg. 9-10) be edited as follows:

> Additionally, AT&T presents the Section 2-619 argument regarding Counts I, II, and III of the Complaint – allegations that AT&T has violated the Public Utilities Act (the "PUA") – should be dismissed as to both Category 1 and Category 2 charges, because "the Complaint must be decided, if at all, by reference to the parties' ICA." Motion at 19. AT&T argues that the Commission's role is to determine whether AT&T has complied with the ICA and, if it has not, to order AT&T Illinois to comply." Motion at 4. AT&T does not specifically point out under which one of the nine grounds for dismissal in Section 2-619(a) it raises such argument. Nonetheless, AT&T's Motion seems to imply that the presence of the parties' ICA is an "affirmative matter" under Section 2-619(a)(9), which defeats Cbeyond's claim that AT&T has violated the PUA. Motion at 2, 11, 19-22. Because it has already been determined that Cbeyond's challenge to the Category 1 charges constitutes an impermissible collateral attack, the only issue to be determined here is whether the presence of the parties' ICA should warrant dismissal of Cbeyond's allegation that AT&T has violated the PUA when it billed Cbeyond "CCC charges associated with the initial provisioning of new DS1/DS1 EELs" – the Category 2 charges.

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[57] *Id*. at p. 10.

The fact that there is a binding contract between the parties in itself should not be deemed an affirmative matter defeating Cbeyond's claim. If AT&T adhered to the ICA between the parties, then it arguably did not violate the PUA provisions cited by Cbeyond. However, if AT&T acted outside the ICA, then it can violate the PUA – and the ICA would not, indeed could not, act as an affirmative matter under Section 2-619(a)(9). So the threshold question is whether AT&T breached the contract (Count IV). If Count IV survives AT&T's Motion to Dismiss, then we must leave our determination regarding the PUA counts, if properly pled, to the outcome of the case regarding Count IV – the breach of contract claim.

4. Proposed Changes To Section III.(c)(1), Entitled "That Counts I, II, And III Should Be Dismissed Because Cbeyond Did Not Revise Those Three Counts Pursuant To The ALJ's Ruling On August 31, 2012."

The ALJ's Proposed Order relating to AT&T's Section 2-615 Motion To Dismiss cannot stand for four reasons: (1) AT&T's 735 ILCS 5/2-615 Motion To Dismiss is facially inadequate; (2) Cbeyond did plead sufficient facts for at least Counts I, II and III; (3) the ALJ relied on a factually inaccurate representation to dismiss Counts I, II and III; and (4) it is an abuse of discretion to dismiss Counts I, II and III with prejudice given the lack of guidance in the ALJ's prior order, as well as the prior Order's finding that Cbeyond had sustained its Count IV.

A. AT&T's Motion Is Deficient

Under 735 ILCS 5/2-615(a) and (b), a motion to dismiss must "point out specifically the defects complained of . . ." and "must specify wherein the pleading or division thereof is insufficient."[58] This portion of AT&T's Motion To Dismiss is a single page in which AT&T asserts that "Cbeyond has the burden of proof" and that, "because Cbeyond's amendments did

[58] *Lee v. Conroy*, 13 Ill. App. 3d 694, 695-96, 300 N.E.2d 505, 506 (3d Dist. 1973) ("The defendant's motions to dismiss do not point out in what way the plaintiff's pleading may be insufficient. . . . the defendant's motions are inadequate for their purpose.").

not 'cure' the defects" set forth in the ALJ's [August 31] ruling, Counts One, Two, and Three of the Complaint should be dismissed."[59] However, it is AT&T who bears the burden as the movant on a motion to dismiss.[60] AT&T's burden was to identify specific defects in the Complaint, which AT&T failed to do.[61] AT&T's general allegations in its Motion To Dismiss are legally insufficient.

Normally, a Section 2-615 motion to dismiss would set-out the required elements of pleading, and show how or why one or more of those elements were insufficiently pled. Here (as with the ALJ August 31 Order), Cbeyond is left wondering what exactly is the defect. Like AT&T's Motion To Dismiss, the August 31 Order identified no specific defect:

> This leaves AT&T's arguments that the Public Utilities Act does not apply. Additionally, there is the matter of issue preclusion, if the matter that could have been raised here could have been raised in Docket 10-0188. There simply are not enough facts alleged by Cbeyond in the Amended Complaint or in AT&T's Motion to Dismiss to make those determinations. Therefore, Counts I through III of the Amended Complaint are dismissed, with leave to amend, in accordance with the specifications stated in the status hearing held on August 30, 2012.[62]

The "specifications stated in the status hearing" in the above quotation are the same quoted in AT&T's Motion To Dismiss. Because Cbeyond's counsel was left to wonder what defect warranted dismissal, he asked for specifics at the hearing, and the ALJ stated the she "need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to

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[59] AT&T Motion To Dismiss, at pg. 32

[60] *Id.*

[61] *Id*.

[62] August 31, 2012 ALJ Ruling, at pg. 6.

Cbeyond."[63] The ALJ didn't say "the elements are A, B and C – and you are missing facts to support B" – the ALJ requested help from Cbeyond in identifying what the elements of each claim were.

Cbeyond, however, is under no burden to identify for the Commission the elements of a claim. *See* 735 ILCS 5/2-603. Cbeyond must allege sufficient facts to support the elements of a claim, but it is not obligated to also identify the elements themselves. A failure by Cbeyond to do something it is not legally required to do cannot form the basis for dismissal under 735 ILCS 5/2-615. While Cbeyond did attempt to provide guidance to the ALJ in identifying the elements, Cbeyond certainly fulfilled its pleading obligations.

B. Cbeyond Did Plead Sufficient Facts

Cbeyond's Second Amended Complaint quoted from each specific statute for Counts I, II and III.[64] Cbeyond also underlined elements and limited the quotation to the relevant provisions within each quoted statute to assist the ALJ in understanding the parts upon which Cbeyond was relying to state its claims (i.e., the elements of the claim).[65] Cbeyond provided dozens of paragraphs of facts to support its claims and stated the actions and elements constituting AT&T's violation of that statute within the specific Count.[66] Despite all of this, the fact remains that it

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[63] AT&T Motion To Dismiss, at pg. 32.

[64] 2nd Am. Complaint, at ¶¶ 11-13.

[65] *Id*.

[66] *Id.* at ¶¶ 8 to 55.

was AT&T's burden as movant on a motion to dismiss to demonstrate the specific defect in Cbeyond's Second Amended Complaint, and AT&T failed to do that.[67]

For the sake of laying out the elements, Cbeyond provides suggested substitute language based on the language in the statutes and other known pleading requirements below as an example. In that same substitute language Cbeyond also specifically identifies where the Complaint pleads facts supporting each element. Those element and factual references are:

Count I alleges a violation of PUC Section 13-514(10):

> "Section 13-514 (10) of the Illinois Public Utilities Act (PUA) provides, in relevant part, that a telecommunications carrier violates Illinois law by "unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier **in a manner consistent with the Commission's** or Federal Communications Commission's **orders** or rules requiring such offerings." 220 ILCS 5/13-514 (emphasis in Cbeyond 2nd Am. Complaint)." 2nd Am. Complaint, at ¶12.

So the elements of a violation of Section 13-514 (10) of the Illinois PUA are (in the context of this case):

(1) That the defendant is a "telecommunications carrier";

(2) offering "network elements" that the Commission (or FCC) has determined must be offered on an unbundled basis;

(3) to another telecommunications carrier;

(4) that the "telecommunications carrier" is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules;

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[67] *Lee v Conroy*, 13 Ill. App. 3d 694, 695-96, 300 N.E.2d 505, 506 (3d Dist. 1973).

(5) that failure is "unreasonable"; and

(6) a carrier must also fulfill the requirements of PUA Section 13-515(c) before filing an complaint under this PUA section.

Cbeyond's Second Amended Complaint, Count I (which adopts the general allegations from the Second Amended Complaint paragraphs 1-38) must state facts supporting each element above. It does:

(1) Cbeyond sufficiently pleads facts supporting the element that AT&T is a "telecommunications carrier." 2nd Am. Complaint, at ¶2.

(2) Cbeyond pleads facts supporting the element that AT&T is offering "network elements" that the FCC and Commission require to be offered at 2nd Am. Complaint, at ¶¶ 9, 10, 34-37.

(3) Cbeyond sufficiently pleads facts supporting the element that Cbeyond is a "telecommunications carrier." 2nd Am. Complaint, at ¶1.

(4) Cbeyond also, given the favorable inferences drawn during consideration of this Motion, sufficiently pleads facts supporting the element that AT&T is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules. 2nd Am. Complaint, at ¶¶ 15-27 (stating that the TELRIC UNE rate for the UNE transport at issue in the case, which was developed in ICC Docket 02-0864 includes the CCC activities when CCC is ordered at the same time as the UNE transport, and that that it was not the intention of the Commission in Docket 02-0864 to have the CCC rate applied to transport when it is ordered as part of the transport UNE). Cbeyond further alleges that the alleged misapplication is continuing (2nd Am. Complaint, at ¶¶31 and 38), and further states that it violates FCC rules

(and the parties' ICA codifying those rules) to charge more than the Commission approved TELRIC rate developed in ICC Docket 02-0864 for the transport UNE. 2nd Am. Complaint, ¶¶ at 35-37 and 40.

(5) Cbeyond alleges facts supporting the element that AT&T's billings are unreasonable. 2nd Am. Complaint, ¶¶ at 31, 38 and 40.

(6) And finally, Cbeyond pleads compliance with PUA Section 13-515(c). 2nd Am. Complaint, ¶ at 4.

It is clear from the above that Cbeyond did plead sufficient facts to withstand a motion to dismiss, and the Proposed Order's representation that "the allegations in these counts do not state facts indicating that AT&T breached any law" is incorrect.[68]

The Commission should substitute the language proposed by Cbeyond below:

> Unfortunately, AT&T's Motion fails to identify any specific defect in Cbeyond's complaint. Under 735 ILCS 5/2-615(a), a motion to dismiss must "point out specifically the defects complained of . . .". If Cbeyond failed to plead a fact necessary to one of the counts it brought, AT&T's Motion did not specify what factual deficiency warrants dismissal. When a motion made under 2-615 challenges the factual sufficiency of a claims, it should, by each count challenged, assert the elements required to plead under Illinois law or Commission rule, and then specifically identify what element is unsupported by factual allegation. Neither Cbeyond nor AT&T have provided any assertion of those specific elements. As the movant, AT&T bears the burden in the first instance of identifying the specific defect in Cbeyond's complaint. Its Motion fails in that burden.
>
> While the insufficiency of AT&T's Motion is enough to deny it, in light of the ALJ's prior ruling it is important to determine whether Cbeyond's complaint is defective as to these PUA counts. Under Illinois law, a complaint is deficient when it fails to allege facts necessary for the plaintiff to recover. *Heastie v. Roberts*, 226 Ill. 2d 515, 530, 877 N.E.2d 1064 (2007); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202 (1st Dist.1988). So to determine the sufficiency of Cbeyond's complaint as to Counts I through III, the

[68] Proposed Order, at pg. 12.

Commission must analyze the elements required for the alleged violations of law, and then determine whether Cbeyond plead facts fulfilling each element. Such facts, under the standard of review, shall be construed in a light most favorable to Cbeyond. At this stage, any inferences from factual allegations, if any are to be drawn, are also drawn in Cbeyond's favor. However, mere factual conclusions (e.g. "the defendant breached the contract") are not enough to sustain a complaint – the facts must support each element of a claim. *Id.*

Count I

Taking each count in order: Count I alleges a violation of PUC Section 13-514(10). Cbeyond provided an accurate quotation from the portion of the PUA Cbeyond alleges is violated for its Count I in its Second Amended Complaint at 12:

"Section 13-514 (10) of the Illinois Public Utilities Act (PUA) provides, in relevant part, that a telecommunications carrier violates Illinois law by "unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier **in a manner consistent with the Commission's** or Federal Communications Commission's **orders** or rules requiring such offerings." 220 ILCS 5/13-514 (emphasis in Cbeyond 2nd Am. Complaint)." 2nd Am. Complaint at 12.

So the elements of a violation of Section 13-514 (10) are (in the context of this case):

(1) That the defendant is a "telecommunications carrier";
(2) offering "network elements" that the Commission (or FCC) has determined must be offered on an unbundled basis;
(3) to another telecommunications carrier;
(4) that the "telecommunications carrier" is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules;
(5) that failure is "unreasonable"; and
(6) a carrier must also fulfill the requirements of PUA Section 13-515(c) before filing an complaint under this PUA section.

Turning to Cbeyond's Second Amended Complaint, Count I (which adopts the general allegations from complaint paragraphs 1-38) the Commission must see facts supporting each element above.

(1) Cbeyond sufficiently pleads facts supporting the element that AT&T is a "telecommunications carrier." 2nd Am. Complaint at 2.
(2) Cbeyond pleads facts supporting the element that AT&T is offering "network elements" that the FCC and Commission require to be offered at 2nd Am. Complaint 9, 10, 34-37.
(3) Cbeyond sufficiently pleads facts supporting the element that Cbeyond is a "telecommunications carrier." 2nd Am. Complaint at 1.
(4) Cbeyond also, given the favorable inferences drawn during consideration of this Motion, sufficiently pleads facts supporting the element that AT&T is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules. 2nd Am. Complaint at 15-26 (the TELRIC UNE rate for the UNE transport at issue in the case, which was developed in ICC Docket 02-0864 includes the CCC activities when CCC is ordered at the same time as the UNE transport); that it was not the intention of the Commission in Docket 02-0864 to have the CCC rate applied to transport when it is ordered as part of the transport UNE. 2nd Am. Complaint at 15-27. That the alleged misapplication is continuing. 2nd Am. Complaint at 31 and 38. And that it violates FCC rules (and the parties ICA codifying those rules) to charge more than the Commission approved TELRIC rate developed in ICC Docket 02-0864 for the transport UNE. 2nd Am. Complaint at 35-37 and 40.
(5) Cbeyond alleges facts supporting the element that AT&T's billings are unreasonable. 2nd Am. Complaint at 31, 38 and 40.
(6) And finally, Cbeyond plead compliance with PUA Section 13-515(c). 2nd Am. Complaint at 4.

A cause should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Burdinie v. Village of Glendale Heights* (1990), 139 Ill.2d 501, 504, 152 Ill.Dec. 121, 565 N.E.2d 654; *Payne v. Mill Race Inn* (1987), 152 Ill.App.3d 269, 275, 105 Ill.Dec. 324, 504 N.E.2d 193. Given the facts alleged in Cbeyond's Second Amended Complaint, it appears that Cbeyond has sufficiently plead facts to avoid dismissal of its Count I claim at this early stage in the docket. AT&T's Motion pursuant to 735 ILCS 5/2-615 as to Count I is, therefore, denied.

Count II

Cbeyond's Count II alleges a violation of PUA Section 13-801(g), which provides in relevant part:

Section 13-801(g) of the Illinois Public Utilities Act requires that "Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates . . ." 220 ILCS 5/13-801(g).

The elements required for a complaint under 13-801(g) are:

(1) That "Interconnection, collocation, network elements, and operations support systems" are being provided;
(2) "by the incumbent local exchange carrier";
(3) to "requesting telecommunications carriers"
(4) at a rate that is not "cost-based"

Cbeyond's Second Amended Complaint fulfilled the pleading requirements set-out as numbers 1 through 3 above as part of pleading the elements for Count I, so the only element at issue is whether the "rate" is not "cost-based." Cbeyond certainly pleads sufficient facts to support an allegation that the combination of the CCC rate and the UNE transport rate exceed TELRIC – at least when CCC is ordered and provisioned at the same time as the transport UNE. 2nd Am. Complaint at 15-26. This begs two questions: (a) Should Section 13-801(g)'s reference to "rate" include a combination of rates, which when charged together exceed a single "cost based" rate for a network element; and (b) is the term "cost-based" the same as TELRIC?

"In construing a statutory provision not yet judicially interpreted, a court is guided by both the plain meaning of the language in the statute as well as legislative intent." *Allstate Ins. Co. v. Winnebago County Fair Assoc*., (1985) 475 N.E.2d 230,233, 131 Ill.App.3d 225, 228. It is clear from the statute itself and the legislative history of the statute that 13-801 was intended to be interpreted in a light most favorable to the development of competition in Illinois. 220 ILCS 5/13-801(a) provides that "The Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings."

The legislative history makes it equally clear that Section 801 was intended to open telecommunications markets to competitors. During the debate on the final bill in the House of Representatives, Section 801 was repeatedly described "the part" of the bill intended to be market-opening. For instance, Representative Hamos, in answering questions on the day the bill was adopted by the Illinois House had this to say:

> The problem here has been that because we have two major companies, incumbents, who own the infrastructure, it has been very difficult for newcomers, for the competitors to come to Illinois and be able to access that infrastructure in order to provide services to us. This Bill, especially one very important part of this Bill called Section 801, in fact, will open the market in Illinois.

. . .

> There are some Sections of the Bill, for example, the Section 801 that I had referred to, which is really the market opening portion of this Bill . . . .

Transcription Debate, 69th Legislative Day, May 31, 2001, State of Illinois 92nd General Assembly, House of Representatives, pages 151 and 158.

Give the language of the statute and the legislative history described above, the Commission considers it improbable that the General Assembly intended the prohibition on charging more than "cost-based" rates to be so narrowly construed as to allow an incumbent to circumvent it by charging a combination of rates for a single network element which, when combined, results in more than the "cost-based" rate established by the Commission for that element. Network elements are the piece-parts of the incumbent network Competitive Local Exchange Carriers use to compete. It would be damaging to competition to allow an incumbent to combine rates for a single network element that results in a charge in excess of the "cost-based" rate for that element. The Commission finds that Section 801(g)'s requirement that an incumbent only charge "cost-based" rates for a network element is violated if the incumbent charges several rates for a single network element, if in doing so the resulting combined rate exceeds a Commission-established "cost-based" rate for that network element.

Obviously, an incumbent can charge a combination of rates for a combination of services or network elements when it provides those services or network elements. What an incumbent cannot do is recover twice for a network element it provides once – or recover, in total, more than the Commission-established rate for a particular service or network element. As a consequence, Cbeyond's factual allegation, described herein, that AT&T is violating Section 13-801(g) by improperly charging a combination of rates is sufficient to withstand a Motion to Dismiss pursuant to 735 ILCS 5/2-615.

The remaining question is whether the reference to "cost-based" rate is the same as TELRIC. The Commission need not, however, specifically reach that question. 220 ILCS 5/13-801(a) limits the meaning of the obligations within Section 801 to the identical limits under Section 251 of the federal Telecommunications Act and regulations implementing it. As such, irrespective of what "cost-based" may mean, in the context of Section 801, it means at a minimum the obligations under Section 251 of the Telecommunications Act – or TELRIC. The "cost-based" rate for a network element under Section 251 of the federal Act is TELRIC. So in this circumstance "cost-based" means TELRIC. Cbeyond pled sufficient facts, under the favorable inferences required here, to allege that AT&T is charging more than the TELRIC rate established by the Commission for UNE transport. Cbeyond has met its pleading obligations for the last element of Count II. AT&T's Motion to Dismiss Count II pursuant to 735 ILCS 5/2-615 is, therefore, denied.

Count III

Count III of Cbeyond's Complaint is made pursuant to 220 ILCS 5/9-250, which provides:

The Commission shall have power . . . to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof. 220 ILCS 5/9-250

While this provision certainly gives the Commission authority, it does not appear to impose an obligation on either AT&T or give a right to Cbeyond. Cbeyond's complaint does not indicate how this statute interacts with the facts of the case or provides relief to Cbeyond – even if the investigation of the rate turned up malfeasance by AT&T. Accordingly, this Count is dismissed with leave to amend.

~~Accordingly, AT&T's Section 2-615 motion is granted with regard to Counts I, II, and III (the violation of the PUA claims) of the Complaint.~~

C. The New Fact Of AT&T's Docket 02-0864 Filing Is Significant

The Proposed Order also misconstrues the new evidence submitted by Cbeyond. Cbeyond identified a filing made by AT&T after the Docket 02-0864 Final Order which was consistent with the same testimony Cbeyond included in its earlier complaints.[69] The Proposed Order dismisses this new fact as "*not* new" because it contained the same language as the previously identified testimony.[70] However, the evidence is important for a different reason.

A problem with Cbeyond's case case before the Second Amended Complaint was that the Commission never stated in the Final Order from Docket No. 02-0864 exactly how the parties were to apply the CCC rate.[71] All the testimony and evidence in the case support Cbeyond's

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[69] 2nd Am. Complaint, at ¶ 26.

[70] Proposed Order, at pg. 12 (emphasis in original).

[71] 2nd Am. Complaint, at ¶ 26.

position, but the Order only noted that a CLEC had asked for clarity on the application of the CCC rate, but did not give that clarity.[72] The new fact introduced into the Second Amended Complaint was a filing by AT&T after the Final Order in Docket 02-0864 and made "per" that Order.[73] So after the 02-0864 Docket, the defendant in this case (AT&T) filed a rate case "per" the Final Order in Docket 02-0864 which expressly stated the application of the CCC rate is the application Cbeyond asserts should apply in this case. That filing is a significant admission by the defendant in this case.

Unfortunately, Cbeyond did not explain that significance, and the ALJ dismissed it as nothing new because it contained the same quotation as the testimony in Docket 02-0864.[74] The new evidence is significant not because it agrees with the prior evidence (although that is important as well), but because it was filed by the defendant after the Final Order in Docket 02-0864, and filed by AT&T as "per" that Order.

D. Even If Cbeyond Did Not Plead Sufficient Facts, Dismissal With Prejudice Is Inappropriate

Even if Cbeyond failed to correct the unidentified errors from its prior pleadings, it was certainly an abuse of discretion to dismiss Cbeyond's Counts I, II and III under the facts presented here. The case of *Capital v. Antaal*, Ill. App. 2d 110904, 972 N.E.2d 1238, 362 Ill.Dec. 205 (2nd Dist. 2012) from only a few months ago, is instructive. The plaintiff in *Capital* was a credit card company who filed a complaint against the defendant to collect a credit card

[72] *Id*. at ¶¶ 15-28.

[73] *Id*. at ¶¶ 26.

[74] Proposed Order, at pg. 12

debt under breach of contract and equitable theories. *Id.*, 362 Ill.Dec. at 207, 972 N.E.2d at 1240. The defendant filed a combined motion to dismiss – in part arguing that the credit card company had to file the contract (the credit card agreement) to support its contract claim under the Illinois Rules of Civil Procedure. *Id.* at 208, 214. Under credit card law in Illinois, a new contract is created every time the card is swiped, *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 432 N.E.2d 1309 (1st Dist. 1982), so there was confusion regarding how (or if) the plaintiff could meet the requirement to attach the agreement under the Rules of Civil Procedure. The court granted the defendant's motion, with leave to amend. *Id.* at 209, 1242. The plaintiff in *Capital* filed it amended complaint, this time attaching a cardholder agreement. *Id.* The court held a status hearing thereafter.

In that status hearing the defendant stated an intention to file another motion to dismiss, which the court stated it would likely grant because, as the court stated, some of the counts in the complaint were not properly pled. *Id.* The court expressed a need to get clarification on the interplay of *Garber* and the facts of the *Capital* case. *Id.* at 210, 1243. So the court granted plaintiff leave to file a second amended complaint – which plaintiff did. *Id.* A second motion to dismiss followed. *Id.* The court granted the defendant's motion to dismiss, but this time dismissed the plaintiff's case with prejudice stating that despite "ample opportunity" the plaintiff failed to plead a proper cause of action. *Id.* at 210-11, 1243-44.

The *Capital* case and Cbeyond's case are similar in that there are three complaints and two motions to dismiss; that the Court (the ALJ here) expressed uncertainty as to the required

elements for a properly pled cause of action[75]; and following the second amended complaint, the court (and ALJ) dismissed the case with prejudice.[76]

Importantly, however, in *Capital*, the Court of Appeals agreed with the trial court that the plaintiff had not properly pled its case, but reversed and remanded because, "where even the trial court appears to have been uncertain as to the pleading requirements, we do not believe that precluding the plaintiff from pursuing its claim is a just result." *Capital* at 215, 1248 (emphasis added). The Appeal Court went on to guide, "a complaint generally should not be dismissed for failing to state a cause of action unless it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief." *Id.*

Given that the ALJ previously ruled that Cbeyond did plead sufficient facts to sustain its breach of contract claim, and that neither the ALJ nor AT&T have yet identified how Cbeyond's Second Amended Complaint is deficient, if the Commission determines that AT&T's Motion To Dismiss as to these counts should be granted, the correct outcome is dismissal with leave to amend.

5. Proposed Changes to Section III.(c)(2), Entitled "That Count II Should Be Dismissed on Additional Grounds Because Cbeyond Fails To Allege That AT&T Engaged In Conduct In Violation of Section 13-801 Of The PUA."

The Proposed Order's dismissal of Count II must be corrected to address an insufficient review and incorrect interpretation of Section 13-801(g)'s application to this case. Section 13-

[75] August 31, 2012 ALJ Ruling, at pg. 6, AT&T Motion to Dismiss, at p. 32 ("the ALJ stated that she 'need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond.").

[76] *Compare Capital*, at 210-11, 1243-44 *with* Proposed Order, at pg. 13.

801(g) of the Illinois PUA requires that "network elements . . . shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates . . . .". The Proposed Order dismisses Count II apparently because "[t]he question of whether CCC rate should be applied to a particular service has no bearing whether AT&T has complied with Section 13-801."[77]

Count II (asserting a Section 13-801(g) violation) alleges that "AT&T's misapplication of the CCC rate results in it being double-compensated for seven activities it does only once . . . By billing for services it is not providing, AT&T violated Section 13-801(g). . ." 2nd Am. Complaint, at ¶¶ 45-46. Moreover, the facts incorporated into Count II by reference (and laid-out earlier in the Complaint) assert that by billing two rates (the CCC rate and the rate for transport) for a single network element (transport), AT&T is violating TELRIC (the cost standard for the provision of a network elements at a "cost-based" rates). *Id*. at ¶ 37. Accordingly, the facts alleged by Cbeyond do concern the question of whether AT&T is charging "cost-based" rates.

If the Commission is inclined to accept that AT&T can charge several rates in combination for a single network element so that the total charged well-exceeds a "cost-based" rate without violating a requirement that "network elements . . . shall be provided by [AT&T] to [Cbeyond] at cost based rates," then Cbeyond strongly encourages the Commission to review the eight (8) years of litigation over Section 13-801 in ICC Docket 01-0614 before doing so. It is very clear that AT&T would like Section 13-801 to not apply to it or to its provision of network element to CLECs, but handing AT&T that victory after all the blood and sweat over this provision because the ALJ thinks AT&T's assertion "appears" to be "valid" – and without any

[77] Proposed Order, at pg. 12.

analysis of the statutory history or the thousands of pages of testimony, briefing and orders from past ICC treatment of this provision would be a blind abdication of the Commission's obligations under that statute.

A. Past ICC Orders Should Be Considered

There are literally over a hundred pages of Commission Orders on the subject of Section 13-801, and thousands of pages of testimony and evidence in ICC Docket 01-0614.[78] In order to properly interpret the meaning and application of 13-801(g) in the context of this Docket, the Commission should undertake a thorough review of those materials. The Proposed Order addresses the application in four sentences without any analysis. Proposed Order, at p. 12. That treatment of this subject is deficient on several levels.

For instance, in the Order on Remand (Phase II) in Docket No. 01-0614, the Commission wrote in reference to interpreting Section 13-801 that "The Commission has very limited authority in the area of statutory interpretation. When interpreting a statute, our *primary objective* is to ascertain and give effect to the intent of the legislature." Order on Remand (Phase II), ICC Docket No. 01-0614, filed November 22, 2005, p. 9 (emphasis in original). Yet, there is no mention or analysis in the Proposed Order regarding legislative intent at all.

Moreover, AT&T (then known as SBC) made the exact opposite argument it is making here in Docket No. 01-0614. In response to a Staff suggestion that access at "cost-based" rates could be accommodated without running afoul of FCC rules by developing a non-TELRIC price (but still cost-based), SBC argued:

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[78] *See* ICC Docket 01-0614 *passim.*

> In the first place, SBC states, Staff's approach is not the one the legislature chose. As SBC notes, Section 13-801 tracks federal law on the scope of unbundling. Likewise, instead of departing from federal law on price, the statutory pricing provision mirrors Section 251 of the federal act. Section 13-801(g) says that unbundled access is to be provided "at cost based rates" – tracking Section 251(d)(1)'s federal mandate that the price for unbundled access "shall be * * * based on the cost * * * of providing the * * * network element." Thus, SBC states, the Commission has not developed a state-law pricing methodology (or established state-law prices). even though more than three years have passed since the enactment of Section 13-801.

Order on Remand (Phase I), ICC Docket No. 01-0614, filed April 20, 2005, at p 22.

In this Docket, Cbeyond is asserting that it is a violation of TELRIC for AT&T to double bill for line coding (clear channel), and AT&T is asserting that Section 13-801(g) has no application to the TELRIC pricing allegation at all. But when it suits AT&T to urge that "cost-based" under Section 13-801(g) means the same thing as "TELRIC" and applies to the network elements provided under 251 of the federal Act (like the transport here), it makes the opposite argument that Section 13-801(g) does apply to "network elements" and TELRIC pricing. Cbeyond does not presume to be as expert as the Commission on the meaning of Section 13-801, but the Proposed Order's treatment of the subject was clearly too cursory to stand unchanged.

B. Language of the Statute and Legislative History Are Counter To Proposed Order

The Commission should also consider the plain text and legislative history of Section 13-801(g). "In construing a statutory provision not yet judicially interpreted, a court is guided by both the plain meaning of the language in the statute as well as legislative intent." *Allstate Ins. Co. v. Winnebago County Fair Assoc.*, 131 Ill. App. 3d 225, 228, 475 N.E.2d 230, 233 (1985).

It is clear from the plain text and the legislative history of the statute that Section 13-801 was intended to be interpreted in a light most favorable to the development of competition in Illinois. 220 ILCS 5/13-801(a) provides that "The Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings." (emphasis added). The narrow interpretation of Section 13-801(g) suggested in the Proposed Order is contrary to the requirement that Commission "shall" use Section 13-801 "to the fullest extent possible . . . to implement the maximum development of competitive telecommunications services offerings."

The legislative history also makes it equally clear that Section 801 was intended to open telecommunications markets to competitors. During the debate on the final bill in the House of Representatives, Section 801 was repeatedly described as "the part" of the bill intended to be market-opening. For instance, Representative Hamos, in answering questions on the day the bill was adopted by the Illinois House had this to say:

> The problem here has been that because we have two major companies, incumbents, who own the infrastructure, it has been very difficult for newcomers, for the competitors to come to Illinois and be able to access that infrastructure in order to provide services to us. This Bill, especially one very important part of this Bill called Section 801, in fact, will open the market in Illinois.
>
> . . .
>
> There are some Sections of the Bill, for example, the Section 801 that I had referred to, which is really the market opening portion of this Bill . . . .

Transcription Debate, 69th Legislative Day, May 31, 2001, State of Illinois 92nd General Assembly, House of Representatives, at pgs. 151 and 158.

Given the language of the statute and the legislative history described above, Cbeyond requests that the Commission accept the following proposed substitute language:

AT&T raised one additional argument under Section 2-615 -- that Count II of the Complaint fails to allege that AT&T violated Section 13-801, which requires that "[i]nterconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates." Motion at 33, citing 220 ILCS 5/13-801(g). For the reasons provided in the Commission's denial of AT&T's 2-615 Motion regarding Count II, this portion of AT&T's Motion is also denied. ~~Because the heart of Cbeyond's averment centers on whether CCC rate should be applied at all when Cbeyond either requests: (1) new DS1 circuits in the context of already installed DS1 EELs, or (2) initial provisioning of new DS1 EELs, AT&T argues that Section 13-801 which addresses "cost based rates" has no relevance to Cbeyond's allegation.~~

~~It appears that AT&T has raised a valid point in this argument. The question of whether CCC rate should be applied to a particular service has no bearing whether AT&T has complied with Section 13-801. This is true because the facts alleged by Cbeyond do not concern whether AT&T's CCC rates are cost based. Accordingly, because Cbeyond failed to state a claim In Count II for which relief can be granted, AT&T's Section 2-615 Motion to Dismiss Count II is granted for this additional reason.~~

6. Proposed Changes To Introductory Paragraphs

Cbeyond proposes that the first introductory paragraphs of the Proposed Order be edited to reflect the ruling proposed by Cbeyond in this Brief on Exceptions. In the second introductory paragraph, Cbeyond also suggests deleting an extra quotation mark. Additionally, Cbeyond's proposed language adds the date and description of Cbeyond's Second Amended Complaint.

The edits to the first two introductory paragraphs Cbeyond suggests are:

On October 5, 2012, Cbeyond Communications, LLC ("Cbeyond") filed a four-count Second Amended Complaint. Illinois Bell Telephone Company ("AT&T") subsequently filed a combined 2-615 and 2-619 Motion to Dismiss. For the reasons stated herein, this Motion is granted in part and denied in part.

An Administrative Law Judge's, ("ALJ's") ruling issued on August 31, 2012, granting, in part, AT&T's previous motion to dismiss Cbeyond's First Amended Complaint but allowing Cbeyond leave file a Second Amended Complaint. On October 5, 2012, Cbeyond filed its Second Amended Verified Formal Complaint ("2nd Am. Complaint"). AT&T's combined motion to dismiss followed.

7. Proposed Changes to Section II.(a), Entitled "Docket 10-0188."

Cbeyond proposes that the opening sentence of Section II.(a) of the Proposed Order (at pg. 2) be edited to make it clear that the entire dispute in this Docket was not litigated in Docket 10-0188 (even by AT&T's own argument), only the portion referred to in the Proposed Order as "Category 1" charges. Cbeyond does not take exception to the use of that term to differentiate the two sets of disputes at issue in this docket.

The edits Cbeyond suggests are:

In 2010, Cbeyond attempted to litigate a portion of this dispute (what AT&T calls, and what will be referred to herein, "Category 1" charges) as well as others by filing *Cbeyond Communications, LLC -vs- Illinois Bell Telephone Company*, a Formal Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act, Docket 10-0188.

8. Proposed Changes to the Last Paragraph of Section III (b)(1), Entitled "That Cbeyond Is Barred From Amending It Claim As To the Category 1 Charges."

Cbeyond proposes that the granting of that portion of AT&T's Motion To Dismiss specific to "Category 1" charges be expanded to include all Category 1 claims in all Counts in Cbeyond's Second Amended Complaint. If Cbeyond's claims regarding Category 1 charges in this Docket constitute a collateral attack on the Final Order from Docket No. 10-0188, then every

Count should have that portion of its claim dismissed. Cbeyond does not agree with the ruling of the ALJ regarding the application of the collateral attack doctrine, but is not addressing that element of the Proposed Order in these exceptions.

The edits Cbeyond suggests for the last paragraph of Section III(b)(1) are:

> Regarding application of the collateral attack defense, there is no issue concerning lack of jurisdiction by the Commission or fraud in Docket 10-0188. Cbeyond's challenge to the Category 1 charges is therefore an impermissible collateral attack. *See Hooks*, 187 Ill App 3d at 955, concluding that "[A] judgment may not be collaterally attacked except where the court lacked jurisdiction or its jurisdiction was based upon fraud, accident or mistake." The Commission further notes that dismissing Cbeyond's challenge to the Category 1 charges furthers the public policy of discouraging piecemeal litigation. *See, e.g., Dubina v. Mesirow Realty Development*, (1997) 178 Ill. 2d 496, 507, 687 N.E.2d 871. The courts do not favor re-litigation of that which could have been addressed in earlier-filed litigation. Id. Further, allowing Cbeyond to challenge the Category 1 charges is virtually tantamount to permitting Cbeyond to circumvent and disobey the Commission Order in Docket 10-0188. As AT&T points out, Cbeyond's position defeats the purpose of the appellate procedure. AT&T's Motion is granted as to Category 1 charges in Counts I through IV.

9. Changes to Section III, Entitled "Finding and Ordering Paragraphs."

In the Findings and Ordering Paragraphs, Cbeyond suggests the following changes to Section III (this should be Section IV) of the Proposed Order (at pg. 13) in order to match the changes Cbeyond suggests herein, and to correct the incorrect numbering of that Section:

~~III.~~IV.~~-~~Finding and Ordering Paragraphs

> The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Cbeyond Communications, LLC, is a duly-licensed telecommunications service provider in Illinois;

(2) Illinois Bell Telephone Company, d/b/a AT&T Illinois, is an Illinois corporation engaged in the business of providing telecommunications services to the general public in the State of Illinois; as such it is a "telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(3) the Commission has subject-matter jurisdiction and jurisdiction over Illinois Bell Telephone company and Cbeyond Communications, LLC;

(4) as is set forth herein, Cbeyond Communications, LLC, has either not set forth facts establishing that it has a cause of action with regard to certain claims, or, it has not established that AT&T's affirmative defenses bar assertion of certain claims;

(5) for the reasons stated herein, Counts I through IV of Cbeyond's Second Amended Complaint are dismissed as to Category 1 charges, with prejudice.

(6) for the reasons stated herein, AT&T's Motion to Dismiss Count III is granted without prejudice. Cbeyond is provided thirty (30) days to correct the factual deficiency identified in this Order by amended complaint.

(7) for the reasons stated herein, AT&T's Motion to Dismiss Counts I, II and IV is denied as it pertains to Category 2 charges ~~Complaint filed by Cbeyond Communications, LLC is dismissed with prejudice~~,..

IT IS THEREFORE ORDERED that Counts I through IV of Cbeyond's Second Amended Complaint are dismissed as to Category 1 charges, with prejudice. Count II of Cbeyond's Second Amended Complaint is dismissed with leave to amend. AT&T's Combined Motion to Dismiss Counts I, II and IV is denied as to Category 2 charges. ~~Complaint filed by Cbeyond Communications, LLC is dismissed with prejudice~~, for the reasons stated herein.

IT IS FURTHER ORDERED that the docket remain open, and the case be remanded to the ALJ and proceed consistent with this order.

~~IT IS FURTHER ORDERED that, subject to Section 10-0113 of the Public Utilities Act, this Order is final; it is not subject to the Administrative Review Law.~~

IV. CONCLUSION

For the reasons provided in this Brief On Exceptions and in the interest of justice, Cbeyond Communications, LLC respectfully requests that the Illinois Commerce Commission accept the substitute language proposed herein.

Respectfully Submitted,

Dated: February 4, 2013

CBEYOND COMMUNICATIONS, LLC

By one of its attorneys

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLC	)	
-vs-	)	
Illinois Bell Telephone Company	)	Docket 11-0696
d/b/a AT&T Illinois	)	
	)	
Formal Complaint pursuant to Sections 13-515	)	
and 10-108 of the Illinois Public Utilities Act	)	

NOTICE OF FILING

Please take notice that on February 4, 2013, we caused to be filed via electronic mail with the Illinois Commerce Commission, **Brief On Exceptions On Behalf Of Cbeyond Communications, LLC**. Copies of the foregoing document is hereby served upon you.

/s/ Henry T. Kelly
Henry T. Kelly, attorney for
Cbeyond Communications, LLC

CERTIFICATE OF SERVICE

I, Henry T. Kelly, an attorney, on oath state that I served a copy of the foregoing **Notice of Filing** and **Brief On Exceptions On Behalf Of Cbeyond Communications, LLC** on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on February 4, 2013.

/s/ Henry T. Kelly
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